

SENATE BILL 1629

By Jackson

AN ACT to amend Tennessee Code Annotated, Title 39;
Title 47 and Title 48, relative to the protection of
employee benefits and fiduciary relationships.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 39-14-105(5), is amended by deleting the current language in its entirety and by substituting instead the following:

(5) A Class B felony if the value of the property or services obtained is sixty thousand dollars (\$60,000) or more, or if the thief was in a fiduciary relationship with the victim regardless of the value of the property or services obtained.

SECTION 2. Tennessee Code Annotated, Section 48-2-121, is amended by inserting the following as a new subsection (d) thereto:

(d) It is an offense as well as an unfair and deceptive trade practice for any broker-dealer who provides services as a broker-dealer for any retirement, pension, flexible benefit, healthcare benefit or any other employee benefit plan to also provide services for such plan as a claims manager, benefit manager, or general account manager or otherwise to be responsible for making managerial or investment decisions for such plan. This section shall be construed to prohibit both the direct conflict of interest present if a broker-dealer provides such services personally and the indirect conflict of interest present if the broker-dealer provides such services through the broker-dealer's agents or representatives.

SECTION 3. Tennessee Code Annotated, Title 47, is amended by inserting sections 4 through 8 below as a new, appropriately designated chapter thereto.

SECTION 4. This chapter shall be known, and may be cited, as the "Employee Benefit Protection Act of 2007".

SECTION 5. As used in this chapter, unless the context otherwise requires:

(1) "Commissioner" means the commissioner of commerce and insurance;

(2) "Employee" means any individual employed by an employer in this state;

(3) "Employee benefit plan" means any employee welfare benefit plan or employee retirement income plan or any plan which is both an employee welfare benefit plan and an employee pension benefit plan provided by any employer for any employee in this state;

(4) "Employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan;

(5) "Employee pension benefit plan" means any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan;

(6) "Employee welfare benefit plan" means any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their

beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or any other employee benefit other than pensions or retirement income on retirement or death, and insurance to provide such pensions;

(7) "Employer" means any person with ninety-nine (99) or fewer employees acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity; and

(8) "Participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

SECTION 6. The commissioner shall prescribe a form of notice to be provided to any participant in an employee pension benefit plan who is providing voluntary contributions to such plan and where such plan is not a defined benefit plan regarding the inherent risks associated with investing in plans that rely on the outcome of various investments to determine retirement benefits to the employee. In creating such notice, the commissioner shall rely on the advice and input of leading industry professionals in assessing the risks and potential rewards of undefined benefit plans in relation to traditional defined-benefit pension plans. Such notice shall be provided to participants of such plans on no less than an annual basis in a manner to be prescribed by the commissioner, with the first such notice to be provided no later than January 1, 2008.

SECTION 7.

(a)

(1)

(A) An annual report shall be published by every employer with respect to every employee benefit plan to which this chapter applies. Such report shall be filed with the commissioner in such manner as the commissioner may prescribe by rule, and shall be made available to plan participants.

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include:

(i) A financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) An actuarial statement and opinion, as required by paragraph (4) of this subsection.

(2) If some or all of the information necessary to enable the administrator of the plan to comply with the requirements of this section is maintained by:

(A) An insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account;

(B) A bank or similar institution which holds some or all of the assets of the plan in a common or collective trust or a separate trust, or custodial account; or

(C) A plan sponsor as defined in section 1002 (16)(B) of this title;

then such carrier, organization, bank, institution, or plan sponsor shall transmit and certify the accuracy of such information to the plan administrator within one hundred twenty (120) days after the end of the plan year or such other date as may be prescribed by the commissioner by rule.

(3)

(A) Except as provided in subdivision (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual reports by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b)(3) of this section present fairly and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report.

(B) In offering an opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, as defined by the commissioner, if the accountant makes a statement indicating such reliance.

(C) The opinion required by subdivision (A) need not be expressed as to any statements required by subsection (b)(3)(G) of this section prepared by a bank or similar institution or insurance carrier regulated and supervised and subject to periodic examination by a state or federal agency if such statements are certified by the bank, similar institution, or insurance carrier as accurate and are made a part of the annual report.

(D) The commissioner shall designate the requisite standards that must be met in order for a person to be deemed a “qualified public accountant”.

(4)

(A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary, who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section.

(B) The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section:

- (i) Are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and
- (ii) Represent the actuary's best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

(C) The commissioner shall designate the requisite standards that must be met in order for a person to be deemed an "enrolled actuary".

(D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under subsection (b) of this section to which any qualified public accountant has expressed an opinion, if the actuary makes a statement indicating such reliance.

(b) An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan: a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained;

and any other matters necessary to fully and fairly present the financial statements of the plan.

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; the funding policy, including policy with respect to prior service cost, and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained, and any other matters necessary to fully and fairly present the financial statements of such pension plan.

(3) With respect to all employee benefit plans, the statement required under subdivision (1) or (2) shall have attached the following information in separate schedules:

(A) A statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

(B) A statement of receipts and disbursements during the preceding twelve (12) month period aggregated by general sources and applications;

(C) A schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction, including a notation as to whether such party is known to be a party in interest, maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) A schedule of each transaction involving a person known to be a party in interest, the identity of such party in interest and his relationship or that of any other party in interest to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expense incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain or loss on each transaction;

(E) A schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectable and the following information with respect to each loan on such schedule, including a notation as to whether parties involved are known to be parties in interest: the original principal amount of the loan, the amount of principal and interest received during the reporting year, the unpaid balance, the identity and address of the obligor, a detailed description of the loan including date of making and maturity, interest rate, the type and value of collateral, and other material terms,

the amount of principal and interest overdue, if any, and an explanation thereof;

(F) A list of all leases which were in default or were classified during the year as uncollectable; and the following information with respect to each lease on such schedule, including a notation as to whether parties involved are known to be parties in interest:

(i) The type of property leased and, in the case of fixed assets such as land, buildings, leasehold, and so forth, the location of the property;

(ii) The identity of the lessor or lessee from or to whom the plan is leasing;

(iii) The relationship of such lessors and lessees, if any, to the plan, the employer, employee organization, or any other party in interest;

(iv) The terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options;

(v) The date the leased property was purchased and its cost;

(vi) The date the property was leased and its approximate value at such date;

(vii) The gross rental receipts during the reporting period;

(viii) Expenses paid for the leased property during the reporting period; and

(ix) The net receipts from the lease;

(x) The amounts in arrears; and

(xi) A statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) If some or all of the assets of a plan or plans are held in a common or collective trust maintained by a bank or similar institution or in a separate account maintained by an insurance carrier or a separate trust maintained by a bank as trustee, the report shall include the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or a separate trust, such other information as is required by the administrator in order to comply with this subsection; and

(H)

(i)

(a) A schedule of each reportable transaction;

(b) The name of each party to the transaction, except that, in the case of an acquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold;

(c) A description of each asset to which the transaction applies;

(d) The purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan;

(e) Expenses incurred in connection with the transaction;

- (f) The cost of the asset;
- (g) The current value of the asset; and
- (h) The net gain or loss on each transaction.

(ii) For purposes of this subdivision, the term “reportable transaction” means a transaction to which the plan is a party if such transaction is:

(a) A transaction involving an amount in excess of three percent (3%) of the current value of the assets of the plan;

(b) Any transaction (other than a transaction respecting a security) which is part of a series of transactions with or in conjunction with a person in a plan year, if the aggregate amount of such transactions exceeds three percent (3%) of the current value of the assets of the plan;

(c) A transaction which is part of a series of transactions respecting one (1) or more securities of the same issuer, if the aggregate amount of such transactions in the plan year exceeds three percent (3%) of the current value of the assets of the plan; or

(d) A transaction with or in conjunction with a person respecting a security, if any other transaction with or in conjunction with such person in the plan year respecting a security is required to be reported by reason of subdivision (a).

(4) The commissioner may, by regulation, relieve any plan from filing a copy of a statement of assets and liabilities (or other information) described in subdivision (3)(G) if such statement and other information is filed with the commissioner by the bank or insurance carrier which maintains the common or collective trust or separate account.

(c) The plan administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan;

(2) The name and address of each fiduciary;

(3) Except in the case of a person whose compensation is minimal and who performs solely ministerial duties, the name of each person, including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan, who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest;

(4) An explanation of the reason for any change in appointment of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian;

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the commissioner may find necessary or appropriate.

(d) The commissioner may prescribe by rule that an employer include in the annual report of an employee pension benefit plan any such additional information that, in the commissioner's discretion, may be necessary to fully and fairly disclose the actuarial position of the plan.

(e) If some or all of the benefits under the plan are purchased from and guaranteed by an insurance company, insurance service, or other similar organization, a report under this section shall include a statement from such insurance company, service, or other similar organization covering the plan year and enumerating:

(1) The premium rate or subscription charge and the total premium or subscription charges paid to each such carrier, insurance service, or other similar organization and the approximate number of persons covered by each class of such benefits; and

(2) The total amount of premiums received, the approximate number of persons covered by each class of benefits, and the total claims paid by such company, service, or other organization; dividends or retroactive rate adjustments, commissions, and administrative service or other fees or other specific acquisition costs paid by such company, service, or other organization; any amounts held to provide benefits after retirement; the remainder of such premiums; and the names and addresses of the brokers, agents, or other persons to whom commissions or fees were paid, the amount paid to each, and for what purpose. If any such company, service, or other organization does not maintain separate experience records covering the specific groups it serves, the report shall include in lieu of the information required by the foregoing provisions of this subdivision:

(A) A statement as to the basis of its premium rate or subscription charge,

(B) The total amount of premiums or subscription charges received from the plan, and a copy of the financial report of the company, service, or other organization; and

(C) If such company, service, or organization incurs specific costs in connection with the acquisition or retention of any particular plan or plans, a detailed statement of such costs.

SECTION 8. The commissioner is authorized to promulgate rules and regulations to effectuate the purposes of this act. All such rules and regulations shall be promulgated in accordance with the provisions of Tennessee Code Annotated, Title 4, Chapter 5.

SECTION 9. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 10. For the purpose of promulgating rules, this act shall take effect upon becoming a law, the public welfare requiring it. For all other purposes, this act shall take effect January 1, 2008, the public welfare requiring it.